No. 78-1595

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE CALVIN LEWIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 591 F.2d 978.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on March 19, 1979. The petition for a writ of certiorari was filed on April 18, 1979. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution for unlawfully possessing a firearm.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner, who had previously been convicted of a felony, was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner received a sentence of 18 months' imprisonment. A divided panel of the court of appeals affirmed (Pet. App. 1-15).

The undisputed evidence at trial showed that on January 28, 1977, petitioner possessed a .32 caliber revolver that had previously been shipped in interstate commerce. In addition, petitioner acknowledged that in 1961 he had been convicted in Florida state court of the felony of breaking and entering with intent to commit a misdemeanor.

Shortly before trial, petitioner's counsel advised the court that he had information that petitioner had not been represented by counsel at his 1961 Florida trial. He contended that a conviction for violation of Section 1202(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth

Amendment rights. The district court, however, ruled that the constitutionality of the Florida conviction was immaterial with regard to petitioner's status as a previously convicted felon for purposes of Section 1202(a)(1). Accordingly, petitioner did not present any evidence on whether in fact he had been convicted in 1961 without the aid of counsel.

DISCUSSION

This case presents an important and recurring question under the federal gun laws. The courts of appeals have divided over whether an allegedly unconstitutional prior felony conviction may serve as the predicate for prosecuting a previously convicted felon who has received, possessed, or transported a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1), or App. 1202(a)(1). See, *e.g.*, *United States* v. *Edwards*, 568 F.2d 68, 72 n.3 (8th Cir. 1977) (noting conflict without deciding the issue). Although we believe that this issue was correctly decided against petitioner, we do not oppose his petition for a writ of certiorari in light of the conflict among the courts of appeals.

1. As the court of appeals recognized (Pet. App. 8), there is a conflict among the circuit courts as to whether and in what circumstances a defendant may raise the invalidity of his prior conviction as a defense to a prosecution for unlawfully possessing, receiving or transporting a firearm in violation of 18 U.S.C. 922(g)(1), 922(h)(1), or App. 1202(a)

(1).[1] In addition to the instant holding both the Third and the Tenth Circuits have held that at least some categories of unconstitutional convictions may be the basis for a valid conviction under either Section 1202 or Section 922. See *United States* v. *Graves*, 554 F.2d 65, 68-70, 73-75, 76-82 (3d Cir. 1977) (en banc) (Section 1202(a)(1)); and *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978) (Section 922(h)(1)).[2] Conversely, the Fifth,

[1] Petitioner was convicted of violating Section 1202(a)(1). Although that statute differs substantially in scope from Sections 922(g) and 922(h), see *United States* v. *Batchelder*, No. 78-776 (argued Apr. 18, 1979), the three statutes are seemingly identical with regard to the issue presented by this case. Thus the various statutes were simultaneously enacted by Congress as separate provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, 236-237. And the pertinent language of the provisions is virtually the same insofar as all three sections prohibit any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year from obtaining firearms. See 18 U.S.C. 921(a)(20)), 922(g)(1), 922(h)(1), App. 1202(a)(1), and App. 1202(c)(2). Accordingly, we do not believe that decisions involving Section 1202 may be distinguished from those involving Section 922 with regard to the issue presented here. In any event, we further note that the decision below is in square conflict with *United States* v. *Pricepaul*, 540 F.2d 417 (9th Cir. 1976), and *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972).

[2] Both *Graves* and *Barker* involved a prior conviction that was allegedly unconstitutional as a matter of due process of law rather than a denial of the Sixth Amendment right to counsel that was alleged here. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The *Graves* court specifically indicated that it might reach a different result if a Sixth Amendment violation were involved. See 554 F.2d at 82 & n.68. See also *United*

Sixth, and Seventh Circuits have stated that a prosecution under either Section 1202 or Section 922 may not be predicated on a prior conviction that was obtained without counsel. See *Dameron* v. *United States*, 488 F.2d 724 (5th Cir. 1974) (Section 922(g)); *United States* v. *Maggard*, 573 F.2d 926 (6th Cir. 1978) (Section 1202(a); dictum); *United States* v. *Lufman*, 457 F.2d 165 (7th Cir. 1972) (Section 1202(a)). See also *United States* v. *DuShane*, 435 F.2d 187, 189-190 (2d Cir. 1970) (Second Circuit reached same result under predecessor statute to Section 1202). Moreover, the Ninth Circuit has concluded that a defendant may not be convicted under Section 1202(a)(1) if his prior conviction was obtained in violation of any federal constitutional right that implicates "the judicial guilt-determination process." *United States* v. *Pricepaul*, 540 F.2d 417, 421 (9th Cir. 1976). Cf. *United States* v. *Liles*, 432 F.2d 18 (9th Cir. 1970).[3]

States v. *Maggard*, 573 F.2d 926 (6th Cir. 1978) (only constitutional violations appearing on the face of the prior conviction may be raised as a defense to prosecution under Section 1202; ineffective assistance of counsel distinguished from complete absence of counsel). In *Barker*, the Tenth Circuit broadly held that "an underlying prior conviction will apply in a federal firearm prosecution if it has not been challenged on appeal or by collateral attack." 579 F.2d at 1226.

[3] There appears to be a related conflict among the courts of appeals regarding whether a defendant may raise the invalidity of a prior conviction as a defense to a prosecution for making a false statement in connection with the acquisition of a firearm. See 18 U.S.C. 922(a)(6). All of the circuit courts that have considered this question except the Ninth Circuit have held that the constitutionality of the prior con-

2. The courts below correctly concluded that petitioner may not raise the alleged unconstitutionality of his prior conviction as a defense to a prosecution under Section 1202(a)(1). That statute broadly declares that no "person who * * * has been convicted by a court * * * of a felony" shall receive, possess or transport firearms. No exception is made for persons whose convictions are for any reason invalid (provided, of course, that they have not been set aside prior to the alleged offense). To the contrary, the language of Section 1202 strongly suggests that it is the fact of conviction that imposes a disability on an individual. See *United States* v. *Graves*, *supra*, 554 F.2d at 69.[4]

The conclusion of the court of appeals is further buttressed by the express enumeration of the limited exceptions to Section 1202(a)(1) found in Section

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viction is immaterial to a prosecution under Section 922(a)(6). Compare *United States* v. *Graves*, *supra*; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, 545 F.2d 481 (5th Cir.), cert. denied, 434 U.S. 908 (1977); *Cassity* v. *United States*, 521 F.2d 1320 (6th Cir. 1975); *United States* v. *Edwards*, *supra*, with *United States* v. *Pricepaul*, *supra*.

[4] Congress could reasonably assume that the fact of conviction was a strong indicator of potential irresponsibility and dangerousness, even if that conviction was subject to collateral attack. See *Scarborough* v. *United States*, 431 U.S. 563, 571-572 (1977); *United States* v. *Liles*, *supra*. See also 18 U.S.C. App. 1201. Indeed, Section 922(h)(1) prohibits any one under indictment for a felony from receiving a firearm, regardless of whether that person is later acquitted. See, *e.g.*, *United States* v. *Pricepaul*, *supra*, 540 F.2d at 421; *DePugh* v. *United States*, 393 F.2d 367 (8th Cir.), cert. denied, 393 U.S. 832 (1968).

1203. Section 1203 provides that the only felons who are exempt from the prohibitions of Section 1202(a)(1) are those who have been entrusted with a weapon by a prison authority and those who have obtained a specific pardon meeting the requirements of Section 1203(2). The existence of these two specific exemptions belies petitioner's contention that felons who have never challenged their convictions are exempted from the purview of Section 1202(a)(1).[5] And the legislative history clearly reflects Congress' understanding that the fact of conviction terminated a person's right to possess a firearm, subject only to the exceptions of Section 1203. See 114 Cong. Rec. 13868-13869, 14773-14774 (1968) (remarks of Sen. Long, sponsor of Section 1202).

Finally, we do not believe that *Burgett* v. *Texas*, 389 U.S. 109 (1967), and its progeny[6] mandate a different result here. The *Burgett* line of cases stand for the proposition that convictions obtained without

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[5] We further note that the contrary conclusion could seriously hamper the comprehensive regulation of firearms established in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1226 (codified at 18 U.S.C. 921-928). Section 922(d)(1) prohibits a firearm dealer from transfering a firearm to anyone he has reasonable cause to believe has been convicted of a felony. This simple and effective prohibition would be rendered nugatory if a convicted felon could relieve the dealer of responsibility by stating that he believed his prior conviction to be unconstitutional.

[6] See *United States* v. *Tucker*, 404 U.S. 443 (1972); *Loper* v. *Beto*, 405 U.S. 473 (1972).

counsel cannot reliably be used for certain purposes. This Court has never suggested, however, that the Constitution precludes mere recognition of an uncounseled conviction as historical fact or that Congress could not constitutionally prohibit a person who has been convicted of a felony from possessing firearms until such time as he successfully challenges his conviction or obtains a pardon in accordance with Section 1203(2). Thus, just as Congress reasonably concluded that the fact of indictment warrants imposition of a disability, see note 4, *supra*, so too Congress could constitutionally bar a convicted felon from receiving or possessing a firearm, regardless of whether that conviction was obtained in violation of the Sixth Amendment. See, Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 336-339 (1976) (concluding that any collaterally unchallenged conviction is a valid predicate felony for purposes of the Act).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294208 399